Supreme Court, U.S.
FILED
APR 5 - 2004
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No. 04 283

In the Supreme Court of the United States

ITAMAR LUBETZKY,

Petitioner

v.

UNITED STATES OF AMERICA

Respondent

On Petition for Writ of Certiorari
To the First Circuit Court of Appeals

PETITION FOR WRIT OF CERTIORARI

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June 21, 2004

QUESTION PRESENTED

Whether the decision of the First Circuit Court of Appeals, which is in direct conflict with a decision of the Eighth Circuit Court of Appeals, is a correct interpretation of 11 U.S.C. §108(c)(2)?

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Petitioner Itamar Lubetzky respectfully petitions the Court for a writ of certiorari to review the decision below of the United States Court of Appeals for the First Circuit.

OPINIONS BELOW

The Order of the First Circuit Court of Appeals dismissing the relevant appeal is unreported and included in the Appendix at page 1.

JURISDICTION

The court of appeals order dismissing the subject appeal was entered on September 11, 2003. A timely petition for a panel hearing and for a rehearing en banc was denied on January 5, 2004. (App. at 1.)

The jurisdiction of this court is invoked under 28 U.S.C. § 1254(1).

STATUTE INVOLVED

11 U.S.C. §108(c)(2)(c) states:

> Except as provided in section 524 of this title, if applicable nonbankruptcy law, an order entered in a nonbankruptcy proceeding, or an agreement fixes a period for commencing or continuing a civil action in a court other than a bankruptcy court on a claim against the debtor, or against an individual with respect to which such individual is protected under section 1201 or 1301 of this title, and such period has not expired before the date of the filing of the petition, then such period does not expire until the later of -
> (1) the end of such period, including any suspension of such period occurring on or after the commencement of the case; or

(2) 30 days after notice of the termination or expiration of the stay under section 362, 922, 1201, or 1301 of this title, as the case may be, with respect to such claim.

STATEMENT

This case involves a recurring question as to the interpretation of 11 U.S.C. §108(c)(2)(c). In the last year the First Circuit Court of Appeals (hereinafter the "First Circuit") and the Eighth Circuit Court of Appeals ("Eighth Circuit") have reached conflicting conclusions regarding the correct interpretation of this statute. The interpretation of this statute is of critical importance to the Petitioner as his appeal of the judgment against him, which is substantively meritorious, would be denied should the Court adopt the view of the Eighth Circuit.

Here, the First Circuit dismissed the second appeal (hereinafter the "Second Appeal") filed by the Petitioner. The Second Appeal was filed due to uncertainty over the vitality of the first appeal (hereinafter the "First Appeal") which was filed during the pendency of the Petitioner's bankruptcy. At the time of the filing of the Second Appeal the First Circuit had not considered the First Appeal. As of the date hereof, the First Circuit has not considered the substantive issues to be raised on appeal nor has a date been established for the filing of briefs.[1]

The procedural history of this matter is unusual

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[1] As of the date of the original filing of this writ no briefing schedule had been set. A briefing schedule has since been established.

largely due to the Petitioner's filing for the protection provided by the United States Bankruptcy Code during the time period allowed for the filing of an appeal. Accordingly, a short recitation of the procedural events which are believed to be relevant follows.

On or about, September 27, 1999 Mr. Lubetzky was assessed by the Internal Revenue Service ("Service") as a person responsible for the failure of Mediaforum, Inc. to pay over payroll taxes for the quarters beginning with July 1, 1996 and ending with March 31, 1997 and for the quarter beginning October 1, 1997 and ending December 31, 1997.

On July 27, 2000, Mr. Lubetzky filed an action in the Federal District Court requesting relief from the Service's assessment.

Judgment entered against Mr. Lubetzky on June 28, 2001.

On August 13, 2001, the Federal District Court denied Mr.Lubetzky's Motions for a New Trial and for Judgment as a Matter of Law.

On August 24, 2001, Mr. Lubetzky filed for the protection provided by Chapter 7 of the United States Bankruptcy Code.

On September 24, 2001, an Appeal was filed (the "First Appeal"). The First Appeal was assigned docket number 01-2357.

On or about June 5, 2003, Mr. Lubetzky received a discharge of liabilities from the United States Bankruptcy Court.

On June 30, 2003, Mr. Lubetzky filed an appeal which has been assigned docket number 03-1931 (the "Second Appeal").

On August 4, 2003, the Court entered an Order (App. at 3) which stated (in part):

> Upon review of the record in this case [No. 03-1931], it appears that this court does not have jurisdiction to consider the appeal because the notice of appeal, filed on June 27, 2003...appears to be untimely.
>
> ...
>
> In addition, on September 25, 2001, appellant filed a notice of appeal from the same judgment, and that appeal is proceeding in this court...it appears that appeal no. 03-1931 may be duplicative of appeal no. 01-2357. Because two cases are not necessary to appeal a judgment, if appellant does not choose to move for voluntary dismissal of appeal no. 03-1931, appellant is ordered to show cause, in writing filed by 8/18/03, why both cases should remain open.

The Petitioner responded to the Court's August 4, 2003 order with a Motion to Reconsider and to Consolidate. In such Motion, at page 2 paragraphs 10 through 12, the Appellant maintained that 11 U.S.C. allowed for an appeal to be filed within thirty days after the entry of a discharge by the United States Bankruptcy Court.(App. at 5.)

On September 11, 2003 the Court entered judgment dismissing the Second Appeal finding that the Second Appeal was untimely and that the Petitioner had not addressed the issue of duplicative appeals.

Thereafter, the Petitioner timely requested a panel rehearing or, in the alternative, a rehearing en banc. The

Petitioner maintaining that the First Circuit Court of Appeals misapprehended 11 U.S.C. §108(c)(2) and that its decision conflicted with the Eighth Circuit's (recent) decision in In re Hoffinger Industries, Inc., 329 F.3d 948 (2003).

On January 5, 2004, the First Circuit found that "Appeal No. 03-1931 was properly dismissed as it is entirely duplicative of appeal No. 01-2357 from the same judgment." (App. at 1).

REASON FOR GRANTING THE PETITION

The Adoption by the Court of the Conclusion of the Eighth Circuit Court of Appeals Which Conflicts with the Decision in this Matter Would Lead to a Deprivation of the Petitioner's Right to an Appeal

In the present matter the First Circuit Court of Appeals has determined that the Second Appeal was duplicative of the First Appeal. By so doing the First Circuit Court of Appeals created a direct conflict with the Eighth Circuit Court of Appeals.

The clear language of 11 U.S.C. §108(c)(2) allows a person who has filed for the protection of the United States Bankruptcy Code to file for an appeal of an adverse judgment for a period begins with the date of the discharge provided by the Bankruptcy Code and ending thirty days from that date. The Second Appeal was filed in accord with this statutory provision.

The ruling of the First Circuit dismisses the Second Appeal as it was entirely duplicative of the First Appeal. In essence the First Circuit finds that the Second Appeal was superflous. The First Circuit's dismissal of the Second

Appeal is of great consequence to the Petitioner as the First Appeal would not be valid should this Court adopt the position of the Eighth Circuit Court of Appeals.

In June of 2003 the Eight Circuit Court of Appeals in In re Hoffinger Industries, Inc., 329 F.3d 948 (8th Cir. 2003) found that appeals filed on the same judgment during the pendency of a bankruptcy and within thirty days thereafter were valied.

In Hoffinger, Leesa Bunch was awarded more than $13,000,000. in a products liability suit in California state court against Hoffinger Industries, Inc. ("Hoffinger"). Hoffinger filed a petition under Chapter 11 of the United States Bankruptcy Code "around a month" after the judgment for Leesa Bunch. Id. At 950.

Hoffinger also filed a notice of appeal approximately one month after filing for bankruptcy. Hoffinger also filed a motion with the Bankruptcy Court to retroactively annul the stay. The motion was granted.[2] Thereafter, Hoffinger filed a second appeal within the time allowed by 11 U.S.C. 108. Id.

In finding that both appeals were meritorious, the Court stated as follows:

> Because an appeal by a debtor-in-possession (on behalf of a debtor) in a case in which the debtor originally was the defendant is a "continuation" of a

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A motion to annul was not filed in the proceedings before the Bankruptcy Court. The Petitioner believes that the United States will argue that the Court has no jurisdiction over the First Appeal due to the clarification in the law which has been brought about by In Re Hoffinger Industries, supra.

"proceeding against the debtor," see Farley v. Henson, 2 F.3d 273, 275 (8th Cir. 1993), we believe that 11 U.S.C. § 108(c), and not § 108(b), applies. Section 108(c) provides that if applicable non-bankruptcy law... fixes a period for... continuing a civil action in a court other than a bankruptcy court on a claim against the debtor... and such period has not expired before the date of the filing of the petition, then such period does not expire until the later of –

(1) the end of such period...; or

(2) 30 days after notice of the termination or expiration of the stay under section 362...

In Re Hoffinger, at 952

...

As one influential treatise explains:

Thus, when the debtor has a deadline for filing an appeal prior to bankruptcy, if the action was originally brought against the debtor, the trustee [or debtor-in-possession] need not meet the 60 day limit of section 108(b) since the action would have been stayed by section 362. There is no need to file pleadings or other briefs in a proceeding which has been stayed; section 108(c) will be applicable if the stay terminates. 2 *Collier on Bankruptcy* ¶ 108.03[2], at 108-10 (15th ed. rev. 2003); see id., ¶ 108.04[1], at 108-12 to 108-13; cf., e.g., Raley v. Lile, 861 S.W.2d 102, 104 (Tex. Ct. App. 1993). But see Production Credit Ass'n of Minot v. Burk, 427 N.W.2d 108, 111 (N.D. 1988) (deeming § 108(b) applicable). Id.

In Re Hoffinger, at 952

...

> Because of the additional time allowed by § 108(c)(2) to perform certain actions after the stay has been lifted, such as filing a notice of appeal, retroactive annulment of the stay to rehabilitate a void notice of appeal will seldom be necessary. But we recognize that circumstances may arise in which, for various reasons, granting retroactive relief may be appropriate, and this case, we believe, presents one such situation.

In Re Hoffinger, at 953

...

> At the outset, we note our belief that the second notice of appeal was timely even without the retroactive relief that the bankruptcy court granted...

In Re Hoffinger, at 954

At no time did the Petitioner's bankruptcy counsel file for relief from the stay provided for by the Bankruptcy Code. A fact which was made clear to the First Circuit.

Accordingly, should this Court find the First Circuit Court of Appeals reasoning to be unconvincing, the Petitioner's First Appeal will ultimately be dismissed on procedural and not substantive grounds.

The Second Appeal was filed on the thirtieth day of same month on which the Appellant's discharge was granted. This appeal meets each of the requirements of 11 U.S.C. § 108(c)(2). This appeal is not duplicative of the First Appeal in that it compliance with the statutory requirements for an appeal is beyond dispute.

The Petitioner has met all statutory requirements for the appellate consideration of his appeal. Justice requires that his appeal be heard.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted

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Dated: June 21, 2004

APPENDIX

United States Court of Appeals
For the First Circuit

Nos. 01-2357 & 03-1931

ITAMAR LUBETZKY,

Plaintiff, Appellant,

v.

UNITED STATES,

Defendant, Appellee.

Before
Boudin, Chief Judge,
Torruella, Selya, Circuit Judges,
Cyr, Stahl, Senior Circuit Judges,
Lynch, Lipez and Howard, Circuit Judges.

ORDER OF COURT
Entered: January 5, 2004

Appeal No. 03-1931 was properly dismissed as it is entirely duplicative of appeal No. 01-2357 from the same judgment. The petition for a panel rehearing is denied.

The petition for rehearing en banc having been submitted to the active judges of this court and a majority of the judges not having voted that the case be heard en bane, it is ordered that the petition for rehearing en bane be denied

By the Court:

/Signed
Richard Cushing Donovan, Clerk.

United States Court of Appeals
For the First Circuit

No. 03-1931

ITAMAR LUBETZKY,

Plaintiff, Appellant,

v.

UNITED STATES,

Defendant, Appellee.

ORDER OF COURT
Entered: August 4, 2003

Upon review of the record in this case, it appears that this court does not have jurisdiction to consider the appeal because the notice of appeal, filed on June 27, 2003 in civil action no 00-11490-RWZ (D.Mass.) from the judgment entered on June 28, 2001, appears to be untimely. See Fed.R.App.P.4(a) (notice of appeal in civil case in which the United States is a party must be filed within sixty days of judgment or order appealed from).

Accordingly, appellant is ordered either to move for voluntary dismissal of the appeal pursuant to Fed.R.App.P.42(b) or to show cause, in writing filed by 8/18/03, why this appeal should not be dismissed for a lack of jurisdiction. The failure to take either action will lead to a dismissal of the appeal for a lack of diligent prosecution. See Loc.R.3(b).

In addition, on September 25, 2001, appellant filed a notice of appeal from the same judgment, and that appeal is proceeding in this court as appeal no. 01-2357. It appears that appeal no. 03-1931 may be duplicative of appeal no. 01-2357. Because two cases are not necessary to appeal a judgment, if appellant does not choose to move for voluntary dismissal of appeal no. 03-1931, appellant is ordered to show cause, in writing filed by 8/18/03, why both cases should remain open. The failure to take either action by 8/18/03 may result is a dismissal of appeal no. 03-1931 for a lack of diligent prosecution. Loc.R.3(b).

By the Court:
Richard Cushing Donovan, Clerk
/Signed
By Julie Gregg
Appeals Attorney

UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

Case No. 01-2357

Case No. 03-1931

ITAMAR LUBETZKY,

Appellant

v.

UNITED STATES OF AMERICA,

Appellee

ITAMAR LUBETZKY'S MOTION TO RECONSIDER AND TO CONSOLIDATE

Now comes, Itamar Lubetzky, to move the honorable Court to reconsider its ruling of August 4, 2003 and to consolidate the subject appeals.

As reasons therefore, Mr. Lubetzky states the following:

1. The Appellant brought an action before the Federal District Court (the "Action") to appeal the Internal Revenue Service's (the "Service") assessment, pursuant to 26 U.S.C. 6672, of responsibility for the failure of MediaForum. Inc. ("MFI") to pay payroll taxes.

2. To appeal an assessment pursuant to 26 U.S.C. 6672, a taxpayer must pay the amount of payroll tax attributable to one employee for a taxable period (i.e., one calendar quarter), file a claim for refund for the amount paid, and if the refund claim is denied or the IRS fails to act on the refund claim within six months, the taxpayer must initiate a suit in either the United States District Court or the United States Court of Federal Claims.

3. Mr. Lubetky paid withholding tax for the fourth quarter of 1997 and requested a refund of same in the Action (the "Refund Claim"). The United States brought a Counterclaim against Mr. Lubetzky for the taxable periods beginning with July, 1996 and ending with December 31, 1997 (the "Counterclaim").

4. That Judgment entered against Mr. Lubetzky on June 28, 2001.

5. On August 13, 2001, the Federal District Court denied Mr. Lubetzky's Motions for a New Trial and for Judgment as a Matter of Law.

6. On August 24, 2001, Mr. Lubetzky filed for the protection provided by Chapter 7 of the United States Bankruptcy Code.

7. On September 24, 2001, an Appeal was filed. Such appeal was assigned a docket number of 01-2357.

8. On December 12, 2001, the Court in ruling on

Mr. Lubetzky's motion to Intervene that "The parties agree that the proceedings concerning the IRS counterclaim against appellant are stayed... This order is not to be constued as expressing any view regarding the appellant's standing or authority to pursue this appeal."

9. The Bankruptcy Trustee did not prosecute the refund portion of the appeal leading to the dismissal of that portion of the appeal.

10. That portion of Mr. Lubetzky's action which defends against counterclaims filed against him by the United States was stayed by 11 U.S.C. 362. ("Counterclaim Appeal").

11. On or about June 5, 2003, Mr. Lubetzky received a discharge of liabilities from the United States Bankruptcy Court.

12. 11 U.S.C. 108(c)(2) grants a debtor a thirty (30) day extension to file an appeal which has been precluded by the Bankruptcy Code's automatic stay.

13. On June 30, 2003, Mr. Lubetzky filed an appeal which has been assigned docket number 03-1931.

14. The Court's ruling of February 26, 2002 specifically leaves open the issue of the viability of the appeal which was assigned docket number of 01-2357.

15. That there are no apparent precedents which address the issues presently before the Court

in this matter.

16. That the Appellant is without guidance as to whether the appeal having been assigned the docket number of 01-2357 is viable.

17. That it is likely but not certain that the Court would find that the appeal which has been assigned docket number 03-1931 is superfluous should it find that the initial appeal is viable.

18. That justice requires that an appellant not be required to make a decision which has tremendous economic impact and which must unavoidably be predicated on uncertain and unresolved law.

19. That consolidating the filed appeals provides assurance that the Appellant will have his appeal heard.

20. That justice requires that the appeals be consolidated.

For these reasons, Mr. Lubetzky prays this honorable Court to:

a. Reconsider its ruling of August 4, 2003;
b. Allow the Appellant's motion to consolidate; and,
c. Any and all other remedies that this honorable court deems appropriate.

Itamar Lubetzky
by his attorney

/Signed
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(781) 380-0770

CERTIFICATE OF SERVICE

I, Timothy J. Burke, hereby certify that I have served a copy of the above motion to all attorneys of record on this date August 14, 2003.

/signed
Timothy J. Burke

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

CIVIL ACTION NO. 00-11490-RWZ

ITAMAR LUBETZKY

v.

UNITED STATES OF AMERICA

JUDGMENT

JUNE 28, 2001

ZOBEL, D. J.

This case was decided by jury trial on the dates of May 29, 2001 through May 31, 2001. The jury, having entered its verdict to the special interrogatories, it is hereby ordered and adjudged that:

1. Plaintiff's complaint is dismissed with prejudice.

2. Judgment is entered in favor of the United States of America on its counterclaim in the amount of $90,644.18, plus interest from June 15, 2001.

3. The United States of America shall recover its

costs in this action, over plaintiff's objections.

June 28, 2001
DATE

s/ Rya W. Zobel
RYA W. ZOBEL
UNITED STATES
DISTRICT JUDGE